No. 83-245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R.A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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This Brief is filed by consent of the parties on behalf of the National Association of Manufacturers (NAM) in support of the Appellee. Written consents are filed with the Office of the Clerk.

INTEREST OF THE AMICUS CURIAE

The NAM is incorporated under the laws of the State of New York as a not-for-profit, voluntary business association representing approximately 13,500 manufacturers and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. Many of NAM's members are required by their

collective bargaining agreements with various labor unions to make payments to multiemployer pension plans, and many of these plans have unfunded vested benefits (UVB).

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), P.L. 96-364; 29 U.S.C. §§ 1381 *et seq.* (Supp. V 1981), created and forced onto contributing employers a liability for the UVB of multiemployer plans which reaches into billions of dollars and which by some estimates may exceed $50 billion.[1] This liability affects employers even when they have not withdrawn from a plan because it must be reflected in their financial statements. *Peick v. PBGC*, No. 82-2081, slip op. at 57 (7th Cir. Dec. 19, 1983) (dissenting opinion).

MPPAA is disrupting the day-to-day conduct of business. See 128 Cong. Rec. E5326 (daily ed. Dec. 18, 1982). Businesses cannot be sold; older businessmen cannot retire and cannot sell their companies. *Id.*; 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Plants with declining demand for their products cannot close. *Id.* Huge liabilities are being imposed as the result of events such as losing a competitive bid contract or bargaining to impasse with a labor union. 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Joining a multiemployer plan has become a strike issue, and the plans, their beneficiaries, and contributing employers all are suffering as a direct result of MPPAA.

Since NAM member companies are some of the principal obligors of MPPAA withdrawal liability, and since NAM and its members have a profound and lasting in-

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[1] *See* Pension Benefit Guaranty Corporation, Multiemployer Study Required By P.L. 95-214, App. XIV, at 11, 14 (July 1, 1978) printed in *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess., 1149-1481 (1980) [hereinafter "PBGC Report"].

terest in the well-being of the multiemployer pension system in the United States, NAM is vitally interested in the Court's decision in this case.

SUPPLEMENTAL STATEMENT

The Oregon-Washington Carpenters-Employers Pension Trust Fund (the Fund), a multiemployer pension plan, found R.A. Gray & Co. to have withdrawn from the Fund on June 1, 1980. The Fund thereafter assessed Gray a liability of $201,359 pursuant to the provisions of MPPAA which did not become law until September 26, 1980 but which Congress made retroactive to April 29, 1980. (J.A. 8-12.) Gray challenged the constitutionality of the Act. The district court dismissed Gray's complaint, but the court of appeals reversed, holding the statute unconstitutional as applied in the retroactive period and reserving ruling on other constitutional issues.

1. The Great Majority of Multiemployer Plans Are Stable and Financially Sound

Multiemployer plans have provided a desirable and effective means of providing for employee benefits because, not being dependent upon the good fortune of one company, they are inherently more stable than single-employer plans. H.R. Rep. No. 96-869, pt. I, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2921 [hereinafter cited as U.S. CODE CONG. NEWS]. An important reason for such stability of multiemployer plans is the "employer turnover assumption." In a stable or growing industry, the withdrawal of an employer from a plan usually will not harm the plan because new employment will fill the void created by withdrawal. *Id.* at 2922. Either new employers will enter, or existing employers will hire additional employees. *Id.* Any injury done to the plan's contribution base by the withdrawal will quickly be repaired.

The fact that a plan has some measure of unfunded vested benefits is not determinative of its financial health. With respect to any defined benefit pension plan there are many factors which are used to measure whether the plan is soundly funded.[2] One factor is the present value of the total amount of vested benefits for which the fund is liable. This is an amount which must be amortized and funded over long periods of time (normally 30 years) and is calculated according to a set of actuarial assumptions and rules adopted by the plan. If a plan's assets are less than the value of its vested benefits, the difference is the measure of the plan's UVB.

Most multiemployer plans have some amount of UVB. In part, this is because plans generally are not designed by the trustees to fund all benefits through employer contributions. A plan can invest the funds it accumulates through contributions and can use its investment earnings to fund benefits. *See* 29 U.S.C. § 186(c)(5)(A) (1976). At any point in time the plan's assets and its liabilities are functions both of its past experience and its predictions of future experience. These in turn are based upon the decisions of the trustees and to some extent by the operation of external economic forces. As long as the plan is amortizing its UVB on a timely basis, the plan will be in good financial condition. *See, e.g.,* 26 U.S.C. § 412 (Supp. V 1981). Many plans have been accumulating UVBs going back to their inception, some as far back as the late 1940's.

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[2] Some of the other quantitative factors that are used to evaluate the financial well-being of a plan include factors used by the PBGC in its 1977 and 1978 studies such as (1) the ratio of retired and inactive vested participants to total participants; (2) the ratio of assets to annual benefit obligations; (3) the ratio of cash flow to assets; (4) the ratio of normal cost to total contributions; and (5) the rate of increase (or decrease) in assets. PBGC Report at 15, App. XIV.

2. The Oregon-Washington Carpenters Fund Is Financially Sound

The Fund in this case is a good example of one that is stable and financially healthy. In 1980, it had assets of $56.9 million, up 24 percent from the previous year, which represented 69 percent of its vested liabilities. (J.A. 74, 80.) The Fund's actuaries found this funding level to be "more than sufficient to pay off the pensioner's liability." *Id.* The percentage of funded vested liability was increasing each year. *Id.* The plan had a funding balance credit of $8.7 million. (J.A. 74.) Moreover, the plan's contribution base was growing steadily. *Id.* Active membership had increased 16 percent and contribution income 21 percent from the previous year. *Id.* Employment activity was up 13 percent from the previous year and 40 percent over the previous three years. *Id.* The percentage of vested employees was declining. (J.A. 77.) The Fund was increasing benefits. (J.A. 65.)

3. The Origins of Withdrawal Liability: Troubled Plans, Declining Industries

In its 1978 Report to Congress, the PBGC expressed concern that there existed a relatively small number of multiemployer plans, about 2 percent of all such plans, which were experiencing such serious financial difficulty that they *might* terminate within five years. U.S. CODE CONG. NEWS 2924; PBGC Report, App. I, at 2-3. Another 10 percent were in such condition that they *might* terminate within ten years.[3] The PBGC feared that if *all* of these troubled plans actually terminated, although unlikely, the cost to the insurance system would be unacceptably high—in the range of $4.8 billion. U.S. CODE

[3] *Id.* The PBGC painstakingly noted how uncertain it was about the validity of these figures, PBGC Report, at 12, 19, 138, and 139, and even stated that "it is not likely that all of these plans would terminate during the 10-year period, or even thereafter. . . ." *Id.* at 139.

CONG. NEWS 2924. The PBGC then proposed that withdrawal liability be made fixed, rather than contingent upon plan termination as it was under existing law.

The immediate purpose of withdrawal liability is to discourage employer withdrawals from financially troubled plans and to reduce the plan's UVB should withdrawal nevertheless occur. 29 U.S.C. § 1001a (Supp. V 1981); U.S. CODE CONG. NEWS 2922-23. The problem of financially troubled plans, in turn, was recognized as one arising principally in declining industries. *Id.* *See* 126 Cong. Rec. H3948-49, 3952 (daily ed. May 21, 1980); PBGC Brief at 8, 30.

There are two important points we would make concerning withdrawal liability under MPPAA. First, the fact of liability is *not* predicated upon any actual injury incurred by the plan, except in a limited range of cases in certain industries and in certain types of transactions. 29 U.S.C. §§ 1383, 1384 (Supp. V 1981). And, second, although MPPAA requires the payment of withdrawal liability ostensibly as a means of reducing a plan's UVB, *see* PBGC Brief at 8-9, the Act does *not* require that withdrawal liability payments be used to improve the funding status of the plan. The plan may use such funds to increase benefits or reduce the future contribution costs of remaining employers. MPPAA thus does not reduce, and may actually increase, the insurance risk to the PBGC.

SUMMARY OF ARGUMENT

The Ninth Circuit decided that the imposition of withdrawal liability upon employers withdrawing from multiemployer pension plans during the statutory retroactive period violated the employers' rights to due process of law. NAM urges that the decision be affirmed in all respects.

If MPPAA is held unconstitutional, the multiemployer pension plans of this country, operating under the aegis

of the Taft-Hartley Act, will not collapse. The great bulk of them remain financially solid. The one at bar is an example: although imposing a "withdrawal" charge on Gray the trustees were increasing benefits and funding levels. The contribution base was growing. Countrywide, trusts and related collectively bargained contracts will continue if the Act is declared unconstitutional. For the handful of funds that may encounter problems, less drastic remedies will solve their problems and not interfere with the normal stream of commerce in which businesses open, close or are transferred.

The court of appeals held the application of MPPAA to be unconstitutional in substantial measure because it required employers "to pay a sum that seriously threatens their solvency, without a specific showing of proportionate need on the part of the pension trust funds. . . ." *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502, 1513-14 (9th Cir. 1983). In this brief, NAM focuses and expands upon this aspect of the Ninth Circuit's opinion which it believes to be of particular importance in analyzing MPPAA against the standards of the Due Process Clause.

MPPAA is an extraordinary piece of legislation. In one sudden stroke it created a massive new liability, probably in excess of $50 billion, for a large sector of the nation's private employers who for many years had agreed, pursuant to their collective bargaining agreements, to contribute to union pension funds. MPPAA donates this huge employer liability to the private purposes of the union pension funds without imposing any constraints as to its use when collected. MPPAA does *not* insure better funding of pension plans because there is no requirement that withdrawal liability actually be used to reduce plan funding obligations. In most cases, the withdrawal liability required by MPPAA is a pure windfall to the plan and can and will be used to increase benefits or reduce future costs to remaining employers. *See* 128 Cong. Rec. E4552 (daily ed. Oct. 1, 1982).

In truth, the great majority of multiemployer plans are well-funded, financially sound, and suffer no lasting injury as a result of employer withdrawals. When an employer is forced to pay into such plans funds substantially in excess of the contributions which it bargained and agreed upon its property is confiscated and transferred to the plan without serving the purposes Congress intended. In the widest range of its application, withdrawal liability serves no public purpose. It provides no improvement in plan funding and no reduction of the PBGC's potential liability. MPPAA is not part of the insurance system. It is an unconstitutional exaction contrary to the Due Process Clause of the Constitution.

The PBGC would have the Court hold that Congress possesses unbridled authority to pass any economic legislation that Congress believes is worthwhile. That position is premised upon an incorrectly broad reading or extension of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Turner Elkhorn* supports Congress' exercise of legislative authority as broad as that asserted by the PBGC only in cases arising from aspects of the employment relationship not involved here. For the Court to uphold the PBGC's position would be to hold that any good end justifies the means and that Congress can use its discretion unfettered in the sphere of economic regulation. It is NAM's position that the Constitution still provides checks and balances and that Congress must adhere to the Constitution and the teachings of this Court by enacting laws which accomplish a legitimate public purpose by reasonable means tailored to that end.

ARGUMENT

I. APPLICATION OF MPPAA TO GRAY VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The Ninth Circuit held that application of the MPPAA withdrawal liability provisions to employers who had withdrawn from multiemployer plans between its proclaimed "effective date," April 29, 1980, and the law's enactment date, September 26, 1980, violated their rights under the Due Process Clause of the Fifth Amendment.

The court of appeals based its ruling on several grounds:

Those employers who had withdrawn during that period did so in justifiable reliance on their collective bargaining agreements and upon existing law under which they clearly were not subject to further liability to their plans; they should not be held responsible for predicting the uncertain outcome of the legislative process. *Shelter Framing*, 705 F.2d at 1511-12. The reliance interests of the employers under the circumstances outweighed those of the plan beneficiaries. The court further found that MPPAA lacked significant moderating provisions. *Id.* at 1514. Most importantly, the court found that MPPAA imposed a severe burden upon employers "without a specific showing of proportionate need on the part of the pension trust funds." *Id.* at 1513-14.

We recognize that our argument here may raise broader questions of the constitutionality of MPPAA than arise solely from the fact that the statute was made retroactive for a period of five months. Some of the Ninth Circuit's reasons for striking down the statute's application to R.A. Gray & Co. arise solely from the fact of retroactive application, while others go to the rationality of the withdrawal liability scheme as a whole. While the PBGC attempts to draw the question before the Court narrowly, limiting the issue to the due process aspects of the stat-

ute's retroactive feature, it nevertheless asks an outright reversal of the Ninth Circuit which did not rule on the constitutionality of the Act as a whole. The effect of such a reversal would be, we fear, reinstatement of the underlying district court judgment that the Act was constitutional—and this without any appellate review of the broad question.

Implicit in virtually everything the PBGC says is its assumption that MPPAA withdrawal liability itself is rational and survives scrutiny under the Due Process Clause. The PBGC claims in its brief that *both* the imposition of liability on employers withdrawing from multiemployer plans *and* the decision to make such liability effective prior to enactment were "eminently rational legislative choices." PBGC Brief at 21-22. The Ninth Circuit expressly limited its ruling on both to the retroactive period but strongly suggested that the underlying rationale of the statute was questionable. The broad question of statutory rationality thus is forced on this Court.

We urge that this Court affirm the decision of the Ninth Circuit in all respects. If the Court reverses the court of appeals, we respectfully submit that it should remand to the Ninth Circuit for further proceedings on the remaining constitutional questions.[4]

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[4] The constitutional issues raised by employers and plan trustees in over 125 actions across the country challenging the withdrawal liability provisions of MPPA include, *inter alia*:

1. Withdrawal liability deprives employers of property without rationally serving a legitimate public purpose, thus denying the employers due process of law;
2. Withdrawal liability represents a taking of private property without a proper public purpose;
3. The Act contains standards for determination of the amount of withdrawal liability which are so vague as to deny due process;

[Footnote continued on page 11]

A. The Standard for Due Process Analysis

The Due Process Clause requires that Congress not legislate in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *Shelter Framing Corp. v. PBGC*, 705 F.2d at 1510; *Nachman Corp. v. PBGC*, 592 F.2d 947, 960 (7th Cir. 1979), *aff'd on other grounds* 446 U.S. 359 (1980). Rationality, in turn, is a function of comparing "the problem to be remedied with the nature and scope of the burden imposed to remedy that problem." *Nachman Corp. v. PBGC*, 592 F.2d at 960. Furthermore, this analysis, under circumstances involving impairment of private contracts, makes highly relevant decisions of this Court rendered under the Contract Clause of the Constitution.

NAM submits that in MPPAA Congress has imposed a massive, even monstrous, burden upon employers in order to remedy a problem which was and is minute by comparison to the solution imposed. The Ninth Circuit was correct in concluding that such a failure of balance and proportion rendered MPPAA's application irrational and unconstitutional.

B. The Rationale Of Turner Elkhorn Does Not Apply

Appellant urges ultimate reliance here upon *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), to the effect that MPPAA withdrawal liability "is justified as a rational measure to spread the costs of the employees'

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[4] [Continued]

4. The Act discriminates irrationally between different classes of employers thus denying equal protection and due process of law;

5. The Act's compulsory arbitration provisions and its presumptions in favor of the plans, violate Art. III, Sec. 1 of the Constitution, deny due process of law, and deny the employers' rights to trial by jury in violation of the Seventh Amendment.

disabilities to those who have profited from the fruits of their labor. . . ." *Id.* at 18. PBGC Brief at 20. This approach is unfounded and inappropriate here.

Turner Elkhorn upheld, against a due process challenge, legislation requiring continuing coal mine operators to pay benefits to victims of black lung disease who had left the industry prior to passage of the act. In *Turner Elkhorn*, the Court faced a situation in which thousands of former industry employees were afflicted with a debilitating disease. That disease resulted from long-term exposure to coal dust, an inherent condition of the employment largely unknown, or at least not well understood, by employers during the time in which those employees had worked. 428 U.S. at 15, 17.

The Court analogized the case to the allocation of interlocking economic rights and duties of employers and employees underlying workmen's compensation laws, citing *New York Central R. Co. v. White*, 243 U.S. 188 (1917). 428 U.S. at 15. Looking back to these basic principles, *White* makes clear that workmen's compensation laws are premised upon the implicit recognition in the employer-employee agreement that the employee may become injured or disabled as a result of his employment. 243 U.S. at 203. Where this occurs, "natural justice" supports a requirement that the employer compensate the employee in some measure for the employee's loss of earning power resulting from the physical disability. *Id.* at 203-04. This loss of earning power is seen as a loss arising from the business itself and as an actual expense of the employer's operation. *Id.* at 203.

The PBGC ignores or avoids this underlying rationale of *Turner Elkhorn*. At page 25 of its brief, the PBGC quotes from *Turner Elkhorn* a passage supporting the proposition that Congress may allocate the interlocking economic rights and duties of employers and employees regardless of contravening arrangements between them

but excises from that quotation the words "upon workmen's compensation principles analogous to those enacted here." 428 U.S. at 15. The PBGC's abridgement gives a far broader meaning to *Turner Elkhorn* than is supported by the decision itself.

MPPAA withdrawal liability is in no way meant to compensate employees for physicial disabilities or loss of earning power resulting from their employment. Rather, the employer's contributions to a pension fund are simply a form of additional compensation to employees, like wages or benefits established through the collective bargaining process. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-46 (1978). Unfunded vested benefits, moreover, do not arise from any unknown, inherent condition of employment. They have always been a known factor of multiemployer plans controlled principally by the trustees of the plans—not by the employers. *See Peick v. PBGC*, 539 F. Supp. 1025, 1047 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. Dec. 19, 1983).

Turner Elkhorn is distinguishable too in that Congress' black lung program required the beneficiaries to prove *need*. An employer was required to pay benefit claims *only* upon proof by the employee (or his survivors) that he suffered from the disease. 428 U.S. at 10-12. MPPAA, in sharp contrast, requires potentially massive payments to pension plans without any requirement of need on the part of the pension plan or its beneficiaries. *See infra*, pp. 21-24.

In upholding Congress' black lung legislation in *Turner Elkhorn*, the Court distinguished its earlier decision in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), on grounds that

> The point of black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific

> need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

428 U.S. at 19. This distinction, consistent with the workmen's compensation theory on which it was based, is completely invalid here. It argues instead for reliance on *Alton Railroad* and against the application of *Turner Elkhorn.*

In bargaining with labor, an employer premises his agreement upon the total cost of an employee compensation package. This includes wages and benefits, pension fund contributions being a major component of benefits. The allocation of that total employer package between present wages, and pension contributions, health and other benefits is a matter generally left to the labor side of the bargaining process. If less is allocated to pension contributions than to current wages, this can cause multiemployer plan UVB. In effect, MPPAA penalizes employers for past allocation decisions by imposing an additional cost for past labor beyond what the employer bargained for, agreed upon, and paid. *See Allied Structural Steel,* 438 U.S. at 245-46. MPPAA thus does not allocate "an actual measurable cost" of the employer's past business to the employer. Instead, it adds a new and additional past cost which the employer never agreed to assume and for which a third party, the plan's board of trustees, has had full authority and responsibility.[6] *See N.L.R.B. v. Amax Coal Co.,* 453 U.S. 322, 329-30 (1981). The reasoning and result of *Turner Elkhorn* both are inapposite here.

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[6] Until 1947 the plans were controlled solely by the unions. Even after Taft-Hartley, unions have generally dominated the trusts.

C. The Solution Is Not Rationally Related To The Problem

We turn to the most closely analogous precedent—the Court's decisions in *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978), and *Railroad Retirement Board v. Alton Railroad Co.,* 295 U.S. 330 (1935). In *Alton Railroad, supra,* the Supreme Court held that a retroactive pension funding plan violated the employer's due process rights. The Court found the statute unconstitutional in large part because it required employers to fund pensions for thousands of persons who were not employed in the industry at the time the law was enacted. The act offended due process because it altered long-term contractual rights, requiring employers to take from future earnings to pay additional amounts for services which had been fully compensated when rendered in accordance with existing contracts. 295 U.S. at 349. It resurrected and imposed new burdens upon transactions long since past and closed. *Id.* at 350, 354. *See Shelter Framing Corp. v. PBGC,* 705 F.2d at 1512-13.

More recently, the Court struck down a Minnesota statute through which the state had attempted to impose liability upon employers for termination of their pension funds. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). The case is directly relevant to the one now before the Court. Although *Allied Structural Steel* involved state action and was decided under the Contract Clause of the Constitution, Art. I, § 10, cl. 1, the principles for determining the rationality of legislative action it articulated apply with equal force to federal action through the Due Process Clause.

As Madison wrote, "[L]aws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist, No. 44. The Founding Fathers thus adopted the Contracts Clause as a "constitutional bulwark in favor of personal security and private rights."

Id. See Allied Structural Steel, 438 U.S. at 245; *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 427-28 (1934). It would, therefore, be clearly in derogation of the basic precepts of a federal government, as held by our Founders, for the legislative acts of the federal government impairing private contracts to be judged by substantially different standards than those imposed upon the states with all of their innate powers. *See United States Trust Co. v. New Jersey,* 431 U.S. 1, 21-23 (1977). The courts have frequently equated analysis under the Contracts and Due Process Clauses, *see Blaisdell,* 290 U.S. at 438, 447-48; *Veix v. Sixth Ward Building & Loan Ass'n,* 310 U.S. 32, 41 (1940); *Perry v. United States,* 294 U.S. 330, 353-54 (1935); *Lynch v. United States,* 292 U.S. 571, 579 (1934), and have done so specifically in the context of federal pension fund legislation, *A-T-O, Inc. v. PBGC,* 634 F.2d 1013, 1024 (6th Cir. 1980); *Nachman Corp. v. PBGC,* 592 F.2d at 959. It would strain credulity if this Court were to take the position that the standards and limitations imposed upon the states by the Contract Clause were substantially weakened as they passed through the Due Process Clause to be applied to acts of the federal government.[6] *See Peick v. PBGC,* 593 F. Supp. at 1040 n.31.

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[6] The PBGC, of course, argues for just such a position. PBGC Brief at 24-27. Its supporting analysis is flawed. The PBGC refers to the constitutional debates to support its proposition that the substance of the Contract Clause was not intended to apply to federal legislation. *Id.* at 24-25. The passage cited on its face would not appear to prove as much as the PBGC would like. More importantly, the debates in question pertained to the constitution *before* its modification several years later by a Bill of Rights which, *inter alia,* prohibited the Federal Government from depriving its citizens of property without due process of law. Library of Congress, *The Constitution of the United States, Analysis and Interpretation,* at XXXIX (1973). The fact that several of the Court's decisions cited by the PBGC have applied a due process analysis without mentioning the Contract Clause would also seem to prove very little.

In *Allied Structural Steel* this Court spoke clearly and forcefully to virtually the same subject as that presently before the Court. In striking down Minnesota's statutory termination liability, the Court relied upon two points which are important here:

First, the statute had nullified the employer's express contractual obligations, imposing a "completely unexpected liability in potentially disabling amounts", 438 U.S. at 247, 250.

Second, it had done so without any showing by the state that this severe disruption was necessary to meet an important general social problem. *Id.*

Necessity is a vital element of reasonableness and justification. *Id.* at 242, 244. In *United States Trust Co. v. New Jersey*, the Court struck down a state statute under the Contract Clause principally because the state, even though it had an admittedly legitimate purpose for its act, nevertheless failed to show that its statute was necessary to achieve its plan. 431 U.S. at 29. The statute could not be said to be essential where less drastic modifications of the law or alternative methods would have permitted the state to achieve its goals. *Id.* As the Court emphasized, ". . . [A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 31. The Congress similarly should be bound to act reasonably.

1. *The Burdens Imposed On Employers Are Harsh And Oppressive*

The liability imposed by MPPAA upon contributing employers is staggering. The total amount of UVB for which employers now are responsible ranges easily into the tens of billions of dollars and probably surpasses the $50 billion mark. PBGC Report, App. XIV at 11, 14. Congress has created a "solution" which is, in monetary terms, perhaps 10 to 25 times greater in the aggregate

than the PBGC's estimates of the scope of the potential problem. *See supra*, p. 5. The liability of individual employers may be hundreds of thousands or even tens of millions of dollars, 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982), and in some cases may exceed the total contributions made by the employer or even its entire net worth. 128 Cong. Rec. E5326 (daily ed. Dec. 18, 1982).

The actual payment of withdrawal liability may be triggered by any number of perfectly lawful business or labor actions—the sale of a business, the closing of a plant, or the employees' decertification of a bargaining unit.[7] Even where payment of liability has not actually been triggered by a withdrawal, the contingent liability that exists must be reflected on the firm's financial statements either as a liability or as a note to the financial statement. *Peick v. PBGC*, slip op. at 57. In some cases the amounts of such withdrawal liability have been so substantial as to affect adversely the creditworthiness of the contributing employer. This "illusory" liability has limited the ability of such companies to obtain future financing and in some cases to continue current operations by triggering breaches in loan agreements. In the case of some small companies, the results of MPPAA liability has been to put them into a negative net worth position.

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[7] With respect to this latter point, it must be noted that withdrawal liability has become an economic club held over the heads of employers to prevent them from becoming non-union. The present case is an example. PBGC Brief at 14. Gray retained about 63 percent of its employees and established a single-employer pension plan for its employees. (J.A. 13-14.) A majority of the remaining 37 percent of its employees were reemployed by other contributing employers (J.A. 13). Gray was assessed liability solely because it went non-union. As a construction industry employer, Gray would have been entitled to a statutory exemption from withdrawal liability except that it continued its business activity in the area without a union contract. 29 U.S.C. § 1383(b)(2)(B)(i) (Supp. V 1981). MPPAA thus provides a method by which unions may unduly influence employers against changing their labor relationships.

MPPAA locks employers into unprofitable or even losing business operations, threatens the solvency of some, and discourages new participation in, or the formation of, multiemployer plans. The existence of withdrawal liability where it was not required has created a state of economic gridlock.

2. *Liability Is Imposed Upon Employers For A Problem They Did Not Create*

Withdrawal liability is not impressed upon the employer for any action or wrongdoing of the employer or condition of the workplace. Each multiemployer plan is governed by a board of trustees, composed half of labor and half of employer representatives,[8] which has the exclusive authority to determine:

1. What benefits the fund will pay and under what conditions;
2. what funding will be required; and
3. how the trust funds will be invested.

N.L.R.B. v. Amax Coal Co., 453 U.S. 322, 333 (1981); *Peick v. PBGC*, 539 F. Supp. at 1047. The trustees are fiduciaries and at law owe their *sole allegiance to the beneficiaries of the fund*. *Amax Coal Co.*, 453 U.S. at 329-30.

The unfunded vested benefits of multiemployer plans were created by the policies and actions of the unions, of the plan trustees, of Congress, and by general economic forces—not by the employer. Yet Congress inappropriately chose to allocate responsibility to employers, rather than to the plans, the unions, continuing employers, or taxpayers.

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[8] 29 U.S.C. § 186(c)(5)(B) (1976); U.S. Code Cong. News 2921. Congress required employers to participate in the governance of these funds in particular to protect against union abuses. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 n. 13 (1981); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959).

3. *MPPAA Retroactively Impairs Settled Contractual Expectations*

The harshness and patent unfairness of the Act's allocation of responsibility result from its inherently retrospective nature. There is double retroactivity. Not only is the statute itself applicable to pre-enactment withdrawals, made in reliance upon then-existing law, but it is also retroactive in that it imposes new compensation requirements for past employment relationships. As in *Alton Railroad*, the legislation requires the employer to go back, perhaps as far as 1947, to reopen all of its fully settled employment relationships and to pay considerably more for them. 295 U.S. at 350. In this effect it constitutes a direct abrogation of the employer's collective bargaining agreements. Under those agreements the employer had a defined rate of contribution for its employees and no termination penalty; the employer was not required to provide full funding of all benefits established by the plan trustees. The employer's contribution obligations formed a known, fixed component of its operating costs upon which it based its prices and the overall conduct of its business. MPPAA nullifies those important rights and interests and thereby works a "severe, permanent, and immediate change" in the employer's historical contracts which cannot be justified. *Allied Structural Steel*, 438 U.S. at 246-47.

Moreover, as the Court noted in *Allied Structural Steel*, the Act destroys the employer's reliance on an aspect of the economy in which consistency is particularly important. 438 U.S. at 246-47. Pension plans depend upon the accumulation of large sums over long periods of time to achieve their designated purpose. *Id.* The amounts set aside to fund them are the result of careful calculations and balancing of economic and other risk factors. *Id.* at 247. Sudden, drastic changes in the legal rules governing these funds may threaten the entire system. *Id.*

If MPPAA's scheme is not unconstitutional in its drastic revision of settled contractual expectations, it ultimately fails because it is not a rational means of achieving Congress' purpose.

4. *The Remedy Is Not Justified By And Does Not Address The Problem And Is, Therefore, Arbitrary And Irrational*

In *Allied Structural Steel*, the Court found nothing to show that the legislation was necessary to solve a "generalized social problem" and struck down the statute. 438 U.S. at 247, 250. In *United States Trust*, the legislative solution adopted by the state was held unconstitutional chiefly because it was more drastic than was necessary to solve the problem. 431 U.S. at 31. *See also W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934).

a) Few, if Any, Multiemployer Plans Need Withdrawal Liability

As we have shown above, Congress' admitted purpose in creating withdrawal liability was to protect employee benefits by discouraging employers from withdrawing from multiemployer plans. Where withdrawal nevertheless occurred Congress intended that the employer pay an allocated share of the plan's UVB in order to improve its funding and reduce the likelihood of insolvency. Employer withdrawal was in turn recognized as a problem associated virtually exclusively with financially distressed plans in declining industries. *See supra*, p. 6. The legislative solution to the perceived problem—imposition of absolute withdrawal liability to discourage *all* withdrawals from *all* plans having any measure of UVB—was arbitrary overkill. The fact that Congress did not require that withdrawal liability even be used to reduce a plan's UVB makes the statute all the more irrational. It does not eliminate risk to the PBGC.

The vast majority of multiemployer plans were and are well funded, financially strong and not in any perceptible

danger of insolvency.[9] A prime case in point is the plan involved here. The mere fact that a plan has unfunded vested benefits does not mean that it is financially unsound or in danger of insolvency. The PBGC's 1977 study found that 60.2 percent of all multiemployer plans were 50 percent or more funded (*i.e.*, plan assets represented 50 percent or more of its vested benefits). PBGC Report, App. XIII at 46. Another 30.7 percent of all plans, were 25-49 percent funded. *Id.* In contrast, the report considered a high potential for termination to exist only where a plan was less than 15 percent funded. PBGC Report, at 160. The problem of financially troubled multiemployer plans was not a generalized one; it was quite specific to a relative few plans.

b) Imposition Of Liability For Withdrawal From A Healthy Plan Is Not A Rational Means To A Legitimate Public Purpose

Congress imposed withdrawal liability on *all* employers contributing to multiemployer plans (except those in the specially exempt industries such as construction, 29 U.S.C. § 1383 (Supp. V 1981)) without regard for the financial condition of the plan, the status of the industry, or the actual effect of withdrawal upon the particular plan, and without requiring that withdrawal liability actually be used to improve the funding position of the plan by reducing its UVB. This is irrational; it does not achieve the legislative purpose.

The crucial questions are what are the effects of requiring an employer to pay withdrawal liability to a sound plan and whether such requirement is reasonably related to a legitimate congressional purpose. An employer's withdrawal from a plan will seriously weaken

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[9] *See* PBGC Annual Report, 21 (1982); 128 Cong. Rec. E4552 (daily ed. Oct. 1, 1982); Martin E. Segal & Co., A Survey of the Funded Position of Multiemployer Defined Benefit Plans (1983).

that plan only when it causes a substantial diminution in the fund's contribution base which persists over time. This will occur only when the industry as a whole is in substantial decline.[10] And, even in the case of a plan in a declining industry, the plan's actuaries are required to provide for more rapid funding to the extent believed necessary to offset the decline in contributions.

Not only does a withdrawal not necessarily injure a plan, it may actually improve its funding. For example, if unvested employees in a plan elect to change their union representative, the substantial contributions made to the fund on their behalf would be lost and would produce a surplus to the fund.

Where an employer's withdrawal does not actually injure the contribution base or funding position of the plan, the plan does not need the infusion of withdrawal liability funds in order to fulfill the legislative purpose of preventing plan insolvency and thereby protecting vested employee benefits. In such cases, withdrawal liability is a windfall to the plan, nothing more nor less than a mandatory confiscation and transfer of the employer's property to the plan without service of any demonstrated public purpose. Such money paid into the fund need not, under the statute, be used to pay promised benefits or reduce UVB. Rather it may be used to *increase* benefits or *reduce* the future contribution levels of remaining employers. The withdrawn employer's property is thus used to benefit other employers or the employees of other employers. This was a feature of the plan condemned by this Court in *Alton Railroad*. 295 U.S. at 350, 360.

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[10] One of MPPAA's more discouraging ironies is that the statute itself, through the spectre of withdrawal liability, may be dissuading new employers from entering into plans, thus blocking the regeneration and growth always thought to be one of the great strengths of such plans. 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982); 128 Cong. Rec. E5325-26 (daily ed. Dec. 18, 1982).

MPPAA itself implicitly recognizes that withdrawal liability in the absence of a corresponding injury to the pension plan is inequitable. U.S. CODE CONG. NEWS 3004; *Peick v. PBGC*, 539 F.Supp. at 1051. The Act provides special rules, narrowly applicable only to certain industries and types of transactions, in which withdrawal liability is not recognized where there is no significant injury to the plan's contribution base. 29 U.S.C. §§ 1383, 1384 (Supp. V 1981). Why this should not be a principle of general application is difficult to comprehend.

The directly confiscatory nature of withdrawal liability and its demonstrable lack of public purpose in such a broad range of its application also raise serious questions under the Taking Clause of the Fifth Amendment. The Ninth Circuit found it unnecessary to reach this question. 705 F.2d at 1515. We submit, however, that the Taking Clause further supports the court of appeals' conclusion that MPPAA is unconstitutional in this case.

In sum, the basic failure of MPAA is that it creates a broad class of cases, probably a great majority of the cases arising under the Act, in which substantial withdrawal liability is imposed upon employers, many of whom can ill afford it, without regard for the actual effect of the withdrawal upon the plan, hence without regard for whether the liability is necessary to achieve the legislative purpose. It permits pension plans to assess and collect from employers large amounts of money which they simply do not need and do not use to fund vested employee benefits. The Fund's assessment of withdrawal liability against Gray in this case is an eloquent statement on the fundamental arbitrariness and irrationality of MPPAA.

5. *Congress Could Have Pursued A More Moderate Course*

This is an instance, such as that in *United States Trust*, where Congress could have adopted a more moderate course than it did to achieve its legitimate purposes.

431 U.S. at 29-31. Rather than impose across-the-board liability on all withdrawals from all multiemployer plans, Congress could have focused a solution upon those plans where the real problems existed. This is a constitutional requirement of rationality and reason. *Allied Structural Steel*, 438 U.S. at 242, 244.

Liability could have been made contingent upon, and proportional to, the actual injury inflicted upon the plan, as measured by the contribution base or some other quantitative criteria. Liability might have been premised upon withdrawal from a "failing plan" as defined by such quantitative criteria as the PBGC itself used in 1978 to predict plan terminations. *See* PBGC Report at App. XIV. The statute might have provided, instead of a retroactive period, a gradual phase-in to ameliorate its harsh results.[11] *See Allied Structural Steel*, 438 U.S. at 247, 249 n.23.

It is no answer to say that employers are subject to the unbridled discretion of Congress in all matters of economic regulation. *United States Trust* makes clear that deference to the legislature has limitations. 431 U.S. at 22-23, 30-31. *United States Trust* also teaches that complete deference to a legislative assessment of reasonableness and necessity is not appropriate where the State's self-interest is at stake. 431 U.S. at 26. Such is the case here. MPPAA was passed primarily from the perspective of protecting the PBGC, a government entity,

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[11] The so-called mass withdrawal problem perceived by Congress and offered as justification for retroactive application was a mirage. Employers cannot unilaterally withdraw from a multiemployer plan or terminate a collective bargaining agreement without breaching the collective bargaining agreement or committing an unfair labor practice. 29 U.S.C. § 158 (1976); *Chicago Magnesium Castings Co. v. N.L.R.B.*, 612 F.2d 1028, 1034-35 (7th Cir. 1980); *N.L.R.B. v. R.O. Pyle Roofing Co.*, 560 F.2d 1370, 1371 (9th Cir. 1977). Employers thus could not legally have withdrawn from their plans without the consent of labor, absent bankruptcy or other extraordinary circumstances.

so that it would never be faced with doing the job for which it was created—providing insurance coverage for benefits.

II. THE COURT WILL NOT DEBILITATE MULTIEMPLOYER PENSION PLANS IF IT AFFIRMS THE DECISION BELOW

Should the Court affirm the Ninth Circuit's decision it will not radically affect the multiemployer pension plan system. In the first place, the Ninth Circuit expressly limited its decision to the retroactive period and a similarly narrow affirmance would thus deprive plans of the relatively small amount of liability assessed for withdrawals occurring in that five-month period. There is no allegation from the PBGC that this would cause the insolvency of any plan or an unmanageable burden for the PBGC.

Even if the Court were to consider the broader constitutional issues and to strike down the statute on those grounds, such a ruling would not cause widespread adverse consequences for the multiemployer insurance system or for multiemployer plans generally.

The elimination of withdrawal liability would not adversely affect the multiemployer system in that the vast majority of plans are financially sound, PBGC, *Annual Report 1982* at 21, and withdrawal liability assessment merely constitutes windfalls for them. Such plans would continue to operate as before and would continue to be financially sound. In fact, striking down this liability would eliminate a serious impediment to new employees joining and stabilizing or increasing the contribution base of multiemployer plans. It would relieve the economic gridlock caused by withdrawal liability.

As for the small number of multiemployer plans in declining industries which may have imminent financial problems, the PBGC is in a position to assist them, *see*

PBGC, *Annual Report 1982*, and, we submit, the pre-MPPAA system would be reinstituted.

NAM and its member companies feel strongly that pension obligations should be taken seriously and fulfilled. It is inappropriate, however, to have arbitrary and irrational legislation which impairs the future of the defined benefit pension program in this country. Unless the Court clearly articulates a standard by which pension legislation is to be judged and by which Congress is to act in passing pension legislation in the future, the private pension benefit system in the United States will fall under repeated attack and be subject to quick-fix, arbitrary and irrational schemes which will only further jeopardize defined benefit pensions for retirees and those employees who are presently working and earning credit for their future pensions.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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